# Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor

HIGH COURT (TEMERLOH) — CIVIL APPEAL NO 12–25 OF 1999
VT SINGHAM JC
1 AUGUST 2000

***Civil Procedure** — Appeal — Facts, finding of — Findings drawn from other facts and not based on testimony and credibility of witnesses — Failure of trial judge to consider relevant evidence — Whether appellate court should interfere with findings of fact — When such interference justified*

***Civil Procedure** — Trial — Cross-examination — Admission — Defendant admitted offence and carelessness in cross-examination — Denial of evidence in re-examination — Purpose of re-examination — Whether re-examination change earlier evidence given in cross-examination*

The plaintiff was riding a motorcycle towards his home which was 18km away when a car driven by the defendant collided with him. The plaintiff alleged that the defendant had tried to overtake him. An on-coming car forced the defendant back onto the left shoulder thereby running into the plaintiff. The defendant argued that she was traveling behind the plaintiff and did not overtake him. Without any prior indication, the plaintiff turned to the right and encroached onto her path. The defendant tried to avoid the plaintiff but failed and collided into him. A summons was issued to the defendant under r 10 Road Traffic Rules 1959. The defendant admitted the offence and paid the fine. In cross examination, the defendant admitted that she was about to overtake him when the plaintiff turned right and onto her path. She had tried to avoid him but failed. The accident would not have happened if she had overtaken him carefully. In re-examination, she denied that she had not overtaken the defendant carefully. In closing submissions, counsel for the defendant argued that liability for the accident should be apportioned to 50:50. The sessions court judge, however, found as a fact that the plaintiff was solely to be blamed for the collision. She held that the damage to the motorcycle showed that the plaintiff had turned right without ensuring that it was safe to do so. She gave judgment for the defendant and dismissed the claim. The plaintiff appealed.

**Held**, allowing the appeal and apportioning liability to 50:50:

(1) Where findings of fact are based on inferences drawn from other facts, as opposed to one based on the testimony and credibility of witnesses, the appellate court can interfere with the trial judge's findings of fact (see p 42D–F).

(2) The trial judge had failed to consider relevant evidence, namely, that the defendant had admitted to an offence under r 10 and that she had admitted in cross-examination that the accident would

not have occurred if she had overtaken the plaintiff carefully. Neither could she disregard the concession made by counsel that liability should be apportioned 50:50. If the trial judge had expressly stated in her judgment that she had considered these and still found for the defendant, an appellate court would not be so easily persuaded to substitute the conclusion she had reached (see pp 39I-40B, 43A–D).

(3) The object of re-examination of a witness is to seek clarification of evidence given by him under cross-examination where there is any ambiguity or has caused confusion. It is not an opportunity for the witness to deny expressly clear evidence given by him under cross-examination (see p 41A–B).

(4) Thus the defendant's denial in re-examination does not change her earlier evidence in cross-examination that she did not overtake the plaintiff carefully and that if she had done so the accident would not have occurred (see p 40I).

**[Bahasa Malaysia summary**

Plaintif sedang menunggang motosikal menuju rumahnya yang terletak sejauh 18km apabila sebuah kereta yang dipandu oleh defendan melanggarnya. Plaintif mengatakan bahawa defendan telah cuba memotongnya. Sebuah kereta yang menghala dari hadapan memaksanya semula ke tepi jalan sebelah kiri dengan itu melanggar plaintif. Defendan berhujah bahawa beliau memandu di belakang plaintif dan tidak memotongnya. Tanpa apa-apa amaran yang lebih awal, plaintif membelok ke kanan dan melintasi jalannya. Defendan cuba mengelak plaintif tetapi gagal dan melanggarnya. Satu saman telah dikeluarkan kepada defendan di bawah k 10 Peraturan-Peraturan Lalu Lintas Jalan Raya 1959. Defendan mengaku salah kepada kesalahan tersebut dan membayar dendanya. Dalam pemeriksaan balas, defendan mengaku bahawa beliau hampir memotongnya apabila plaintif membelok kanan dan melintasi jalannya. Beliau cuba mengelak plaintif tetapi gagal. Kemalangan tidak akan berlaku sekiranya ia telah memotong plaintif dengan lebih berhati-hati. Dalam pemeriksaan semula ia menafikan bahawa ia tidak memotong plaintif dengan berhati-hati. Dalam hujah penutup, peguam defendan berhujah bahawa liabiliti untuk kemalangan tersebut seharusnya dibahagikan 50:50. Bagaimanapun, hakim mahkamah sesyen mendapati sebagai fakta bahawa plaintif sendiri harus dipertanggungjawabkan atas kemalangan tersebut. Beliau memutuskan bahawa kerosakan kepada motosikal menunjukkan bahawa plaintif telah membelok kanan tanpa memastikan adalah selamat untuk berbuat demikian. Beliau memutuskan memihak kepada defendan dan menolak tuntutan tersebut. Plaintif merayu.

**Diputuskan**, membenarkan rayuan dan membahagikan liabiliti kepada 50:50:

(1) Di mana keputusan fakta adalah berdasarkan inferens yang dibuat daripada fakta lain, dan bukannya berdasarkan keterangan dan kebolehpercayaan saksi-saksi, mahkamah rayuan boleh mengganggu keputusan hakim perbicaraan atas penemuan fakta tersebut (lihat ms 42D–F).

(2) Hakim perbicaraan telah gagal menimbang keterangan yang relevan, iaitu, bahawa defendan telah mengaku kepada satu kesalahan di bawah k 10 dan bahawa beliau telah mengaku dalam pemeriksaan balas bahawa kemalangan tidak akan berlaku sekiranya ia telah memotong plaintif dengan berhati-hati. Beliau juga tidak boleh mengabaikan hujah yang dibuat oleh peguam bahawa liabiliti haruslah dibahagikan dalam kadar 50:50.

Andainya hakim perbicaraan telah menyatakan dalam penghakimannya bahawa beliau telah menimbang perkara-perkara ini dan masih memutuskan memihak kepada defendan, mahkamah rayuan tidak akan dapat dipujuk untuk menggantikan kesimpulan yang dicapai oleh hakim perbicaraan tersebut (lihat ms 39I–40B, 43A–D).

(3) Tujuan pemeriksaan semula seorang saksi adalah untuk meminta penjelasan keterangan yang diberikannya di bawah pemeriksaan balas apabila terdapat apa-apa keraguan atau telah menyebabkan kekeliruan. Ia bukanlah satu peluang untuk saksi menyangkal keterangan jelas yang diberikannya di bawah pemeriksaan balas (lihat ms 41A–B).

(4) Justeru itu penyangkalan defendan dalam pemeriksaan semula tidak menukar keterangan yang lebih awal bahawa beliau tidak memotong plaintif dengan berhati-hati dan bahawa sekiranya beliau telah berbuat demikian kemalangan tidak akan berlaku (lihat ms 40I).]

## Notes

For cases on finding of facts, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 531–615.

For a case on cross-examination, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4908.

## Cases referred to

*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 (refd)

*Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 (refd)

*Browne v Dunn* (1893) 6 R 67 (refd)

*China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 (refd)

*Chong Keow @ Chong Seaw Oon (suing as the administrator of the estate of Wong Kooi Tai @ Wong Foo Keak, deceased) v Shaari bin Yaacob* [1988] 1 CLJ 325 (refd)
*Coghlan v Cumberland* [1898] 1 Ch 704 (refd)
*Harrison v National Coal Board* [1950] 1 KB 466 (refd)
*Hitam bin Abdullah & Anor v Kok Foong Yee & Anor* [1974] 1 MLJ 193
*Kerry v Carter* [1969] 1 WLR 1372 (refd)
*Lee Hock Lai v Yeoh Wah Pien* [1999] 5 MLJ 172 (refd)
*Lofthouse v Leichester Corp* (1948) 64 TLR (refd)
*Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 (refd)
*Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214 (refd)
*Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373 (refd)
*Samar bte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 (refd)
*Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 (refd)
*Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (refd)
*Tan Kim Leng & Anor v Chong Boon Eng & Anor* [1974] 2 MLJ 151 (refd)
*Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 (refd)
*Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 (refd)
*Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117 (refd)

*S Sivanesan* (*S Siva & Co*) for the appellant.
*V Silvaraju* (*Rajehgopal & Silva Velu*) for the respondents.

**VT Singham JC**:

*Appeal*

This is an appeal by the appellant/plaintiff against the decision of the Sessions Court, Temerloh wherein the appellant/plaintiff's claim against the respondents/defendants was dismissed with costs on 13 July 1999. In this judgment, the appellant and the respondents will be referred to as the plaintiff and defendants, respectively.

*Claim*

The plaintiff's claim against the defendants was for damages arising out of a road accident which occurred on 13 May 1995 at/about 3.30pm at Batu 4, Jalan Songsang/Jerantut/Temerloh. The plaintiff was riding his motorcycle No NX 8942 and the first defendant was driving her motorcar No WBS 9505.

*Plaintiff's version of the accident (evidence in chief) — SP3*

The plaintiff's evidence was that he was riding his motorcycle No NX 8942 from the direction of Temerloh towards Jerantut and returning home at about 3.15pm after his work. His house was 18km from the place of accident. On reaching at/near Batu 4, Jalan Songsang/Jerantut-Temerloh near JL Furniture, his motorcycle has 'dihimpit' by the first defendant's motorcar from the rear which was travelling in the same direction, ie from Temerloh towards Jerantut and he fell. The first defendant's motorcar was in the process of attempting to overtake the plaintiff and at the time there was a motorcar (blue Proton Iswara) coming from the opposite direction which by implication made it necessary for the first defendant to graze against the plaintiff's motorcycle.

*Plaintiff's evidence under cross examination*

Under cross-examination, the plaintiff had stated that the first defendant's motorcar 'terhimpit' his motorcycle and that the first defendant's motorcar which was attempting to overtake did not pass him and 'himpit' him. He denied that there was room for the first defendant's motorcar to overtake him although there was a motorcar coming from his opposite direction on its correct side. He denied that he intended to turn right. He fell onto the right side and on the road. The place of the accident from his place of work was 1km. He denied that his evidence was an invention.

*Evidence of the investigating officer SPI*

The plaintiff's first witness was the investigating officer SP1. The investigating officer's evidence, inter alia, was that he went to the place of accident at 4.05pm. He did not find any traces of brake mark or glass fragments. The damage to the plaintiff's motorcycle was as follows:

> Mudguard depan cover pecah, kemek kuat di kanan, pedal kanan dan brake bengkok, body kanan kemek sedikit, kesan seretan jatuh di kanan.

As to the damage to the first defendant's motorcar, the investigating officer's evidence was as follows:

> Mudguard depan kiri kemek berhampiran tayar depan.

The plaintiff's motorcycle was in the position 'hadapan menghala mengiring ke Temerloh'. He had also stated that the police have taken action against the first defendant under r 10 and that the first defendant had paid the compound.

*First defendant's version of the accident (evidence in chief — SD1)*

She was driving her motorcar from Temerloh intending to return to Jerantut. She was following the plaintiff's motorcycle for about ten seconds. She said, 'saya tidak potong motosikal sebab ada double line.' Immediately after this evidence, the first defendant said, 'saya hampir hendak memotong dia. Saya berada di sebelah kanan. Saya berada di tengah jalan semasa hendak memotong. Motosikal itu belok ke kanan secara tiba-tiba. Saya cuba mengelak dia dapat kena. Kena langgar. Saya melanggar motosikal. Saya hendak mengelak dia. Tak dapat. Saya belok balik 'U turn'. Selepas itu kereta saya ada di atas tanah.'

A *Evidence of first defendant under cross examination*

Under cross-examination, the first defendant said:

> Saya ikut motosikal dari belakang — jarak 1 kereta iaitu 15 kaki. Saya tidak hon. Saya patut hon bila memotong. Saya ada brek. Hampir mahu potong habis. Saya belum lalu dia. Saya di tengah motor. Saya kena saman polis. Saya ada bayar saman. Saya ada brek. Saya tidak brek kuat sangat. B
>
> Accident tidak akan berlaku jika saya potong baik-baik. Saya bayar saman.

*Evidence of first defendant under re-examination*

C Under re-examination, the first defendant said:

> Motor tidak beri isyarat sebelum belok ke kanan. Saya tidak hon kerana depan tak ada kereta. Saya ingat boleh potong. Dia belok dekat. Saya brek sedikit. Cuba mengelak banyak ke kanan tapi langgar juga. Saya bayar kompaun.
>
> Saya tidak setuju saya tidak potong baik-baik.

D

*Written submissions of both counsels at the sessions court*

Both counsels for the plaintiff and defendants tendered written submissions. The plaintiff's counsel had submitted that the first defendant was 100% negligent for the accident. On the other hand, the defendants' E counsel had submitted that liability should be 50:50. However, the plaintiff's claim was dismissed by the learned sessions court judge. Hence, this appeal by the plaintiff on the issue of liability.

*Oral submissions of both counsels at the High Court, Temerloh*

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On 17 January 2000, the plaintiff's counsel had submitted before his Lordship Mohd Hishamudin J who was then hearing civil cases at the High Court, Temerloh and after two adjournments at the request of the defendants' counsel, this appeal was fixed for final continued hearing on 19 June 2000. However, since I have been posted to this court with effect G from 1 June 2000 as the judicial commissioner, I was directed to continue with the hearing or all the part-heard cases by my predecessors.

On 19 June 2000, the plaintiff's counsel informed this court that he had completed his submissions on the previous date of hearing on 17 January 2000 and he did not wish to add anything more to it. The defendants' counsel then made his submissions before me on 19 June 2000. H

*Submission of the plaintiff's counsel before his Lordship Mohd Hishamudin J as contained in the typed notes*

In support of the grounds in the memorandum of appeal, the plaintiff's I counsel, inter alia, submitted that the learned sessions court judge had:

(a) failed to correctly evaluated the evidence of the witnesses to decide on the issue of liability;

(b) failed to consider that there were material contradictions in the evidence of the first defendant and that had her Honour assessed correctly have evidence of the first defendant, she would not have found the plaintiff negligent for the accident; A

(c) failed to direct her mind to the evidence of the material witnesses and had she done so, her Honour would have found the first defendant wholly negligent for the accident; B

(d) erred in law when she failed to give a reasonable decision based on the primary facts and therefore her finding and conclusions were not justified when her Honour found that the plaintiff was solely negligent for the accident. Her Honour's finding was based on inferences of facts and not on specific facts; C

(e) not considered that there was a radical departure from the first defendant's evidence in court where the first defendant said 'hampir mahu potong habis' whereas in her police report, the first defendant did not mention about overtaking at all or even attempting to overtake the plaintiff's motorcycle; D

(f) not taken into account the first defendant's realization of guilt when she said in her evidence while under cross examination that 'accident tidak akan berlaku jika saya potong baik-baik';

(g) not taken into account that the plaintiff's injuries were more consistent with his version of the accident and had displaced the version of the first defendant; E

(h) not taken into account that the plaintiff's evidence was consistent with his police report which was marked as exh P13;

(i) confined her reasoning only to one aspect of the case ie the damage to both the vehicles and had failed to consider all other material aspects of the evidence when she arrived at her decision; F

(j) erred in that the first defendant's counsel never put to the plaintiff that there was no motorcar which was coming from the opposite direction when the first defendant was in the process of overtaking the plaintiff's motorcycle; G

(k) failed to consider that there was no reason for the plaintiff to turn right as he was proceeding straight home which was about 18km away from the place of the accident.

In support of his arguments to reverse the finding of the learned sessions court judge and to find the first defendant 100% liable, the plaintiff's counsel referred to several reported cases on the function of an appellate court which principles are settled. He relied on the case of *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517. In that case, the Federal Court in disturbing the decision of the trial court drew a distinction between a finding of a specific fact which depended upon the credibility of witnesses and a finding of fact which depended on inferences drawn upon other facts. The Federal Court said, in the latter case, an appellate court will more readily H I

A interfere with the trial judge's findings of fact and form an independent opinion. The Federal Court held that, thus, in cases where there is no question of the credibility and reliability of witnesses, the proper inference to be drawn from proved facts, in that an appellate court is generally in as good a position to review and evaluate evidence as the trial judge.

B In the instant appeal, the plaintiff's counsel submitted that there was nothing in the learned sessions court judge's judgment which had indicated that her decision was based on the credibility of the witnesses or the impression she formed of them. He therefore urged upon this court to interfere and reverse that decision of the learned sessions court judge.

C

*Submission of the defendants' counsel before VT Singham JC*

The defendants' counsel submitted as follows:

(a) that when the learned sessions court judge was faced with two conflicting versions, her Honour had correctly relied on the damage to D the two vehicles. The learned sessions court judge was correct in her approach when she found that the plaintiff was totally liable for the accident and that the plaintiff had made a sudden right turn across the road;

(b) the learned sessions court judge did not make or state in so many E words that the accident occurred when the plaintiff had suddenly made a right turn but the defendants' counsel pointed out that notwithstanding any specific finding on this particular negligence, he submitted that the learned sessions court judge must have meant that the plaintiff had suddenly made a right turn because Her Honour had taken a stand that the plaintiff must ensure that it was safe to turn to F the right;

(c) the defendants' counsel repeatedly attempted to remind this court that the word 'himpit' means 'squeeze' and the effect of squeeze would not have caused the kind of damage to both the vehicles as stated by the investigating officer SP1;

G (d) the defendants' counsel also contended that the effect of 'himpit' would not have caused 'kemek kuat di sebelah kanan motorsikal dan kemek' to the plaintiff's motorcycle as stated by the investigating officer SP1. He further contended that if the plaintiff's version is 'himpit' the damage would be lighter or less extensive to the plaintiff's motorcycle whereas the evidence of the investigating officer SP1 is H that the damage to the plaintiff's motorcycle is 'kemek kuat';

(e) the defendants' counsel had also submitted that if the first defendant's motorcar had 'himpit' the plaintiff's motorcycle, the plaintiff should have fallen towards the left side of the road and not towards the middle of the road as shown in the sketch plan and marked as exh P1 I and the photographs marked as exh P2 and that the position of the plaintiff's motorcycle after the accident supports the first defendant's version as to how the accident occurred;

(f) the defendants' counsel further said that the first defendant's evidence was in fact supported by the evidence of the plaintiff's witness, the investigating officer SP1 and the photographs which show the damage to both the vehicles and that the first defendant's evidence was also supported by whose police report which was lodged on the same day of the accident and marked as exh D17; A

(g) he had also submitted that the damage to both the vehicles had shown that the plaintiff had suddenly swerved to the right from the left side of the road which thereby gave the first defendant no opportunity to avoid the accident. The first defendant's counsel also attempted to pick up fault on the plaintiff's pleadings under particulars of negligence in the statement of claim against the first defendant wherein it has been pleaded in para 7(a) of the statement of claim that the first defendant had 'menghimpit plaintiff daripada belakang' whereas under para 7(f) of the statement of claim it is pleaded that the first defendant 'merempuh plaintif dari belakang'; B C

(h) the first defendant's counsel submitted that the issue was whether the plaintiff was proceeding straight when the first defendant 'squeezed' his motorcycle or the plaintiff was making a right turn when the first defendant collided into the plaintiff's motorcycle; D

(i) he also said that the injury to the plaintiff as shown in the medical report dated 20 March 1999 from Hospital Mentakab states that the plaintiff's (R) foot had a 4cm lacerated wound and had also sustained a fractured talus bone, dislocation of talo calcaneal joint and that the x-ray shows that the plaintiff had sustained a fractured talus bone which supported the first defendant's version of the accident. The plaintiff's injuries were also confirmed by a specialist medical report dated 27 May 1999 by Dr KP Subramaniam, a surgeon, that he had a 4cm lacerated wound over lateral border or dorsum of (R) foot and fractured talus bone and dislocation of talo calcaneal joint which was confirmed by an x-ray that the injuries had caused permanent disability to the (R) foot; E F

(j) he therefore contended that the injuries to the plaintiff support the first defendant's version of the accident; G

(k) he referred to several reported cases to support his contention that between two conflicting versions as to how an accident occurred, the superior courts in the reported cases have relied on the damage to the vehicles to determine the issue of liability;

(l) the learned sessions court judge had the advantage of hearing the witnesses and audio-visual and the demeanour of the witnesses; H

(m) in his evidence, the plaintiff had testified that 'himpit' means 'gesel' whereas according to the defendants' counsel 'himpit' means 'squeeze' of the road and 'gesel' means 'grazed' and that this was a contradiction by the plaintiff, SP3. On the other hand, he also contended that if both the words 'himpit' and 'gesel' have the same meaning, the damage to the plaintiff's motorcycle would not be severe. I

A *Whether a minor discrepancy would necessarily change the situation or position as to how an accident occurred*

This court is of the view that a minor discrepancy, if any, depending on the evidence or choice of words in a police report or in evidence in court by a layman would not necessarily change the actual situation or position as B to how the accident occurred. A layman cannot be expected to know the consequences of not using the correct terminology in his evidence in court or in his police report so long as the court is able to follow or comprehend from the totality of the evidence the actual situation the plaintiff or the defendant was faced with when the accident occurred. In this case, the word 'himpit' or 'merempuh' does not in the view of this court C make a great difference in determining how the accident occurred or what the plaintiff meant when he described how the accident occurred as the totality of the evidence has clearly given the true picture as to how the accident occurred. Counsels who represent litigants in court should not attempt to split words into distinct segments and take the court on a wrong D route to suit his or her agenda as counsels are expected not to mislead the court just to sway the court in any manner to give a decision in his or her favour.

In this case, it is clear from the totality of the evidence what the plaintiff meant. He has stated that the first defendant's motorcar while overtaking E his motorcycle had grazed against his motorcycle thereby causing him to fall and resulting in his injuries. The fact that the plaintiff had pleaded, in his statement of claim; the words 'himpit' and 'merempuh' in the view of this court does not change his clear version or the position as to how the accident occurred. It will only make a material difference in a situation where the version of a witness to an accident or incident is not clear or F satisfactory to such an extent that the court is not able to follow or understand what was the actual situation when the accident occurred from the word used by a witness in a given case which necessarily may become an issue to be determined and requires further clarification. In this case, the version of the plaintiff and the first defendant as to how the accident occurred is expressly clear and there can be no issue either to the word G 'himpit' or 'merempuh'.

*Defendants' counsel's submission on the function of the appellate court*

The defendants' counsel submitted that the learned sessions court judge H had correctly addressed her mind to the specific evidence and had made specific findings of fact. Therefore, he submitted that this court should not disturb that finding of fact as her Honour had the advantage of seeing and hearing the witnesses and the demeanour of the witnesses and was in a better position to appreciate the facts and the evidence before her. He added that her Honour had directed herself on the evidence and evaluated the I materials placed before her with care and her consideration of facts is reasonably supported by the evidence. Consequently, he said that the plaintiff's appeal should be dismissed with costs.

### *Reply to defendants' counsel's submission by plaintiff's counsel before VT Singham JC*

The plaintiff's counsel said that the learned sessions court judge had relied solely on the 'kerosakan kepada kedua-dua kenderaan'. He submitted that he defers from the defendants' counsel's submission that 'himpit' means 'squeezing', he submitted 'himpit' means 'perah'. He said that there was material departure from the first defendant's evidence when compared to his police report. The position of the plaintiff's motorcycle after the collision showed that the plaintiff was proceeding straight on when the first defendant's motorcar collided into him. If the plaintiff's motorcycle was turning right as was found by the learned sessions court judge, he submitted that the plaintiff's motorcycle would have been thrown to the right side of the road and not onto the middle of the road. He said the learned sessions court judge had discarded this factor and did not take into consideration many other relevant evidence when arriving at her decision.

### *Plaintiff's counsel submitted as to the function of the appellate court*

As the learned sessions court judge did not direct her mind to the demeanour or credibility of the witnesses, the plaintiff's counsel submitted that this court hearing the appeal in an appellate capacity could interfere with the findings of the learned sessions court judge as her finding was not a specific finding but one which was based on inferences drawn from a set of facts.

He further brought to the attention of this court that the defendants' counsel had submitted at the sessions court that liability should be apportioned on a 50:50 basis; whereas at this appeal stage, the defendants' counsel had changed his stand and had submitted that the plaintiff's claim and appeal should be dismissed with costs which he cannot at this stage change his previous admission that liability should be apportioned on a 50:50 basis.

### *Plaintiff's counsel re-submitting on issues that were already previously submitted*

As the plaintiff's counsel was attempting to resubmit on the issues that he had already submitted before his Lordship Mohd Hishamudin J on 17 January 2000, this court reminded the counsel to confine his reply only to any new issues if any which were raised by the defendants' counsel and not with the view to repeat his submissions as an opportunity to reply is not accorded as of right but at the discretion and control of this court.

### *Defendants' counsel obtained leave to reply*

The defendants' counsel sought leave of this court to reply to the plaintiff's counsel's submission in relation to the defendants' counsel's submission at the sessions court that liability should be apportioned on a 50:50 basis. He submitted that that submission was not an admission. It is important to state here for the purpose of clarity that the concession made by the defendants' previous counsel at the sessions court was not an alternative

A submission to a submission for dismissal of the plaintiff's claim but a single submission that liability should be 50:50.

*Whether trial court is bound to accept concession/admission made by defendants' counsels that liability should be on a 50:50 basis*

B The defendants' counsel submitted that the trial court was not bound to accept that submission that liability should be apportioned on a 50:50 basis because her Honour had the right to look at the overall evidence and her honour had correctly found the plaintiff 100% liable. He further submitted that if this court were to accept the contention of the plaintiff's counsel and find liability on a 50:50 basis because the defendants' counsel had C conceded, that would amount to disregarding the finding of the trial court. He also submitted that despite the submissions of the defendants' counsel (not present counsel) that the liability should be on a 50:50 basis, the learned sessions court judge still found the plaintiff solely liable as the evidence against the plaintiff was overwhelming. However, on realizing that D the defendants' counsel was caught in his own web with that concession, he re-reversed his stand and re-submitted that since it was submitted at the sessions court on behalf of the defendants that liability should be on a 50:50 basis, he would leave it to this court.

*Leave sought by plaintiff's counsel to further reply*

E As a result of the concession made by the defendants' counsel at the sessions court and presently at the appeal stage that liability should be on a 50:50 basis, the plaintiff's counsel sought the permission of this court to submit further and he too changed his stand and submitted that the worst scenario against the plaintiff on liability should be on a 50:50 basis although his F original contention was that the first defendant was solely liable for the accident.

*Whether appellate court can interfere with finding of trial judge*

The law on the function of the appellate court on a question of fact which G was determined by a trial court is well established in several jurisdictions including Malaysia. It has been said time and time again by our Superior courts and in other jurisdictions that a finding of fact based on the evidence of the witnesses should not be disturbed on appeal.

H *Cases which state that appellate court will be slow to interfere with the finding of fact by trial court*

In the case of *Lofthouse v Leichester Corp* (1948) 64 Times Law Reports:

> The Court of Appeal presided by the Lord Chief Justice, Lord Goddard referred to the facts of the case and said that the action was of the kind generally referred to as a running down case. His Lordship said the appellate I court no doubt has a wider power when the matter is tried by a single judge and can reverse the judge on the facts. But the court is naturally very slow to do that, because the judge has an opportunity of seeing and hearing the

> witnesses and obtaining what in these running-down cases, speaking for myself, I think is so important — and which can only be obtained at the trial and not at the hearing of the appeal — the imponderable elements which I may call the atmosphere of the case. Although I do not intend to lay down anything which is necessarily exhaustive, I would say that the court ought not to interfere where the question is a pure question of fact, and where the only matter for decision is whether the judge has come to a right conclusion on the facts, unless it can be shown clearly that he did not take all the circumstances and evidence into account, or that he has misapprehended certain of the evidence, or that he has drawn an inference which there is no evidence to support. I have known cases where this court has interfered because it has thought that the judge who tried the case has decided how the accident happened not on the evidence given, but on how he thought that the accident probably happened. None of those factors is present in this case.
>
> The Court of Appeal had dismissed the plaintiff's appeal.

In the case of *Hitam bin Abdullah & Anor v Kok Foong Yee & Anor* [1974] 1 MLJ 193, the Privy Council had, inter alia, held at p 194 that:

> There was no reason to depart from the established rule that their Lordships' Board will decline to interfere on a pure question of fact.

In the case of *Samar bte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 at p 72, the Federal Court dissenting judgment of His Royal Highness Raja Azlan Shah when His Royal Highness was then a judge of the Federal Court had said:

> It is axiomatic that a finding of negligence, though involving matters of inference, is properly regarded as a finding of fact. For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge.
>
> The learned trial judge accepted the defendant's version that they were approaching in a single file travelling at a moderate speed, that they were not weaving in and out of the crowd, and in the circumstances of the case concluded that the defendant had not sufficient room or time to avoid the plaintiff when she 'straightaway' crossed the road. He was therefore not prepared to find that any negligence of the defendant caused or contributed to the plaintiff's injuries.
>
> I say that the findings of the trial judge ought not to be disturbed. Accordingly this appeal should be dismissed with costs.

In the case of *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117, the Privy Council held in headnote (2) that:

> This was not one of those rare cases where an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility. There was no reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.

In the case of *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214, the Federal Court held in headnote (1) that:

> It would be wrong for the appellate court which had not seen or heard the witnesses to substitute its own finding of fact for that of the learned trial judge.

In the case of *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124, the Federal Court had held in headnote (2) that:

> The question for determination by the learned president in this case was essentially one of fact. The finding of the trial court should not have been disturbed as there was no valid reason to show that the trial judge had not taken advantage of his having seen and heard the witnesses.

*Cases which state that appellate court can interfere with the finding of fact by trial court*

In the case of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87, his Lordship Lord Guest had laid down principles on which an appellate court may interfere with a lower courts's finding of fact and which can be found in the passages at p 92 of his Lordship's judgment:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] AC 484 at p 487; [1947] 1 All ER 582 at p 587:
>
> (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

In the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, the Court of Appeal had said at p 398 that:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

In the case of *Sivalingam*, the Court of Appeal found that there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him and reversed that finding of the trial court.

In the case of *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373, the Court of Appeal per his Lordship Gopal Sri Ram JCA inter alia said:

> Unless we, as a Court of Appeal, are convinced that there was no judicial appreciation of evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case taken as a whole, it will not be open to us to intervene and upset the findings made by a trial judge.

In his Lordship's dissenting judgment, the late HT Ong CJ (Malaya) said in *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 at p 177 that an appellate court is in as good a position as the trial judge to draw its own conclusions from the primary undisputed facts. His Lordship went on to say that it is not correct to assume, as a matter of course and because the trial judge had seen and heard the witnesses, he must necessarily be right. His Lordship further said that even where the trial judge has been impressed by the demeanour of certain witnesses, the appellate court still has an obligation to scrutinize the evidence.

On the function of an appellate court, his Lordship the late Lord Denning MR in *Kerry v Carter* [1969] 1 WLR 1372 at p 1376 said as follows:

> We have been referred to cases on this subject, particularly the recent case of *Brown v Thompson* [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Quintas v National Smelting Board* [1961] 1 WLR 401 at p 409. This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a court of appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly.

### *Conclusion arrived at by sessions court judge*

In her 4 pages grounds of judgment which also contained a summary of the evidence of the plaintiff SP3, the investigating officer SP1 and the first defendant SD1 and at the fourth page which contains only the decision which reads that 'tuntutan pihak merayu ditolak dengan kos', the learned sessions court judge came to the conclusion as follows:

*Finding of sessions court*

(1) kerosakan kepada motosikal tersebut menunjukkan bahawa dia telah belok ke sebelah kanan sebelum perlanggaran;

(2) mahkamah memutuskan bahawa perlanggaran tersebut berlaku di jalan di sebelah kiri jika menghala ke arah Jerantut;

(3) kereta tersebut mengekori motosikal tersebut sebelum perlanggaran dan cuba memotong motosikal tersebut di sebelah kanan motorsikal tersebut;

(4) SP3 harus memastikan adalah selamat untuk beliau belok ke sebelah kanan;

(5) kerosakan kepada kedua kenderaan tersebut, menyokong keterangan oleh SD1 bahawa motosikal telah belok ke kanan;

(6) mahkamah memutuskan bahawa pihak perayu adalah bertanggungjawab;

(7) tuntutan pihak merayu ditolak dengan kos.

*Finding of this court on appeal*

This court is of the view that the conclusion reached by the learned sessions court judge was not based on a finding of a specific fact which depended upon the credibility of witnesses and the impression formed by her Honour but a finding of fact which depended upon inferences drawn from other facts, namely, from the position of the plaintiff's motorcycle after the accident and the damage to both the vehicles involved in the accident.

As the findings of the learned sessions court judge depended upon inferences drawn from other facts and there was nothing in her judgment which had indicated that her conclusion was reached upon the credibility of the witnesses or as a result of the impression she had formed of them, this court in an appellate capacity can interfere with the trial judge's findings of fact by reviewing and evaluating the printed evidence of the case as a trial judge. (See *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326; *China Airlines Ltd v Maltran Air Corp Sdn Bhd*).

As the learned sessions court judge in reaching her conclusion seemed not to have evaluated the whole evidence, with respect this court is of the view that she had not directed her mind in a judicial manner in approaching the case. The learned sessions court judge seemed to have taken an easy course instead of going into detail regarding the evidence. She did not state in her judgment that the plaintiff's evidence was not acceptable. Instead she proceeded to draw an inference from one aspect of the case which in the view of this court was not a finding of a specific fact and was not fully appreciated (*Lee Hock Lai v Yeoh Wah Pien* [1999] 5 MLJ 172).

The learned sessions court judge had failed to consider the other relevant evidence, namely, that the first defendant had admitted to an offence under r 10 LN 166/1959 and a further admission by the first defendant that the accident would not have occurred if she had overtaken the plaintiff's motorcycle in a careful manner coupled with the fact that the defendants' counsel had made a concession before her Honour that liability should be apportioned equally between the plaintiff and the defendants, ie on a 50:50 basis. Although there is no evidence in the printed notes what this r 10 meant this court is entitled to take judicial notice that the offence under r 10 was under LN 166/1959 of the Road Traffic Rules 1959 which read as follows:

> No driver of a vehicle moving along a road shall sleep or otherwise neglect to exercise due control over the movements of the vehicle.

The learned sessions court judge did not say categorically that the plaintiff's version of the accident was rejected, therefore it is open to this court in an appellate capacity to review the printed evidence. With respect, I also do not think that her Honour was entitled to disregard the concession made by the learned counsel for the defendants that liability should be apportioned on a 50:50 basis coupled with the evidence that the first defendant was compounded for an offence under r 10.

In *Tan Kim Leng & Anor v Chong Boon Eng & Anor* [1974] 2 MLJ 151, His Royal Highness Tuanku Azlan Shah (as His Royal Highness then was) a Federal Court judge said as follows:

> In reaching a conclusion the learned judge had to consider the probabilities and the circumstances of the whole case. It was essentially a case in which there should have been a full record of the reasons which persuaded him to reach the conclusion he did. A mere finding of no negligence against both the respondents and that the accident occurred because of the sudden brake failure on account of some latent defect in the braking system, not supported by reasons, is not a judgment according to law.
>
> A judicial determination of a dispute where substantial questions of mixed fact and law arise is satisfactorily reached only if it be supported by the most cogent reasons that commend themselves to the learned judge. Recording of reasons in support of a decision of a dispute serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy. 'It is of course true,' said Sir Alfred Denning (as he then was), 'that his decision may be correct even though he should give no reason for it or even give a wrong reason: but, in order that a trial should be fair, it is necessary not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge himself states his reasons.' See *The Road to Justice*, p 29.
>
> A party to the dispute is ordinarily entitled to know the grounds on which the learned judge has decided against him, and more so, when the judgment is subject to appeal. An appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just.

### *Denial of evidence stated under cross examination in re-examination*

The fact that the first defendant had under re-examination denied that she did not overtake the plaintiff's motorcycle in a careful manner does not

A change her earlier evidence under cross examination that she did not overtake the plaintiff's motorcycle in a careful manner and if she had done so the accident would not have occurred.

*Object of re-examination of a witness*

B The object of allowing a party to re-examine his witness is only to seek clarification of his or her evidence under cross-examination if there were any ambiguity in his or her evidence and if it had caused confusion and certainly not with a view to grant an opportunity to a witness to deny so quickly his evidence which was given under cross-examination and which was expressly clear. *Sarkar on Evidence* (15th Ed, 1999) Vol 2 pp 2193– C 2194:

> ... the right to re-examine a witness arises only after the conclusion of cross-examination and as s 138 of the Evidence Act says, it shall be directed to the explanation of any part of his evidence given during cross examination which is capable of being construed unfavourably to its own side. The object is to D give an opportunity to reconcile the discrepancies, if any, between the statements, in examination in chief and cross examination or to explain any statement inadvertently made in cross examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross examination. Where there is no ambiguity or where there is nothing to explain, questions put in re-examination with the sole object of giving a chance to the witness to undo the effect of a previous statement, should never be allowed. E Leading questions should not be asked in re-examination (s 142).
>
> The re-examination should be confined to matters arising out of the cross examination, and ordinarily counsel will not be allowed to question the witness on matters which could have been asked in examination in chief.
>
> After a witness have been cross examined, the party who called him has F a right to re-examine him and to ask all questions which may be proper to draw forth an explanation of the meaning of the expressions used by the witness on cross examination, if they be in themselves doubtful; and also of the motive or provocation which induced the witness to use those expressions but he has no right to go further, and to introduce a matter new in itself and not suited to the purpose of explaining either the expressions or the motives G of the witness.

*First defendant's version of accident was not put to plaintiff under cross-examination*

On going through the printed evidence of the record of appeal, this court H finds that it was never put to the plaintiff under cross examination the first defendant's version of how the accident occurred and also the plaintiff's evidence as to how the accident occurred was never challenged apart from merely stating that the accident occurred when the plaintiff suddenly turned right which caused the first defendant's motorcar to collide with the plaintiff's motorcycle.

I The learned sessions court judge did not take this failure into account that the plaintiff was not cross-examined on the first defendant's version of the accident when her Honour came to make a finding on inferences. This court is unable to find anywhere in her judgment of such an indication that she did so. In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794, this court in applying the rule in *Browne v Dunn* (1893) 6 R 67 said: A

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may B be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

This court is of the view that if the learned sessions court judge had directed her mind to the correct approach to the evaluation of the evidence, she C would no doubt have found in favour of the plaintiff or at least apportioned liability equally between the plaintiff and the first defendant on a 50:50 basis as conceded by the first defendant's previous counsel.

D

*Findings of trial court reversed by appellate court*

Having read the judgment of the learned sessions court judge and taking into consideration the submissions of counsel for both the plaintiff and the defendants and the totality of the evidence, this court is of the view that this case is one which justified appellate intervention as the learned sessions court judge had not judicially appreciated the evidence presented to the E court.

While plaintiff's counsel although conceded that the appellate court should not generally interfere with the finding of facts made by a trial court, nevertheless, he contended that where the lower court had made inferences from facts, this court can interfere in an appellate capacity. The plaintiff's F counsel relied on the *China Airlines Ltd* principle which followed the *Benmax* principle and sought to distinguish the two different situations of circumstances when generally an appellate court will or will not interfere with a finding of fact of the trial court.

In the case of *Benmax v Austin Motor Co Ltd*, the headnote reads as G follows:

> An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from H specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge.

*Whether trial court should carry out minuet examination of the evidence*

I

It is not the view of this court that the learned sessions court judge should examine minuetly the evidence of the witnesses but her judgment in this case should contain at least what her findings are as to the evidence of the witnesses for both the plaintiff and the defendants, the unchallenged evidence of the plaintiff, the admission by the first defendant that she had paid a compound to an offence under r 10 of the LN 166/1959, the admission of the first defendant at one stage of the proceedings that the accident would not have occurred if she had overtaken the plaintiff's motorcycle in a careful manner and the concession made by the first defendant's counsel that liability should be apportioned on 50:50 basis. Had the learned sessions court judge expressly stated in her Grounds of judgment that she had considered the unchallenged evidence of the plaintiff, the admission by the first defendant to an offence under r 10 and to the admission of the first defendant as to her negligent act aforesaid, and the concession made by learned counsel for the first defendant that liability should be apportioned on a 50:50 basis and still found for the first defendant, this court would not be so easily persuaded to substitute the conclusion reached by the learned sessions court judge when her Honour dismissed the plaintiff's claim. In fact, the learned sessions court judge seemed to have gone on a selecting expedition of the evidence and drew inferences purely on one side of the facts which in the view of this court she had with respect erred in law.

In the case of *Coghlan v Cumberland* [1898] 1 Ch 704 at pp 704–705:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions: and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.

### *Function of trial court when faced with two conflicting versions of an accident*

In road traffic accidents, particularly, those involving third party claims, which come before the courts for trial, there is bound to be two conflicting versions of how an accident occurred. In such a situation, 'the function of the trial court is to carry out a searching evaluation and assessment of the totality of the oral and documentary evidence in order to determine the truth. In the final analysis, it is not merely a question of whom to believe but rather whose version is more inherently probable which is that prime conclusion' (per his Lordship Lim Beng Choon J in *Chong Keow @ Chong Seaw Oon (suing as the administrator of the estate of Wong Kooi Tai @ Wong Foo Keak, deceased) v Shaari bin Yaacob* [1988] 1 CLJ 325 at p 327).

### *Decision of this court*

In the circumstances and bearing in mind that the findings of the learned sessions court judge were not a specific finding of fact based on the evidence of the plaintiff and the first defendant but a finding made on inferences drawn from another set of facts and following the *China Airlines Ltd* principle which followed the *Benmax* principle and taking into consideration the principle in *Kerry*, this court finds that the findings of the learned sessions court judge cannot stand in law on the facts and are clearly against the weight of the evidence and ought to be reversed.

The plaintiff's appeal is allowed and liability is apportioned equally between the plaintiff and the first defendant on a 50:50 basis. The judgment of the learned sessions court judge is set aside. The plaintiff is allowed half the costs of this appeal and full costs in the court below.

### *Trial court to assess damages even if plaintiff's claim is dismissed*

In this case, the learned sessions court judge did not assess the damages provisionally although there were written submissions filed by both counsel. In *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184, the Federal Court said 'Practice requires that assessment should be made even if the decision was against the plaintiff-claimant'.

As the plaintiff is entitled to recover damages for his injuries, pain and suffering and loss of amenities which of course subject to proof, this court directs that damages be assessed by the SAR of the High Court, Temerloh. In this connection, magistrates and sessions court judges are reminded once again that damages have to be assessed by the trial court even if the plaintiff's claim or the defendant's counterclaim is dismissed and whether or not he or she has been specifically requested by counsel to assess the damages. In *Yeoh Cheng Han v Official Administrator, Malaya* [1972] 2 MLJ 7 at p 10, the Federal Court said:

> Coming to the question of damages, it is a matter for regret that the learned judge did not proceed to assess them on the assumption that the matter might go up to a higher court. As has been said in some cases before, it is very desirable for a trial judge to do so even if he comes to a finding that the action must fail.

It is disturbing to note that despite several reported cases that damages have to be assessed by the trial court even if the plaintiff's claim is dismissed, there are still some magistrates and sessions court judges who have total disregard for the decisions of our superior courts. May I take this opportunity to state that no magistrate or sessions court judge is at liberty, whatever his or her private opinion may be, to disregard the decisions of our superior courts.

A The assessment of damages by the trial court will not only save unnecessary expenses, inconvenience and time to the parties but it will also enable a party to the case to decide whether to appeal against the award of damages by the trial court. See *Harrison v National Coal Board* [1950] 1 KB 466 at p 477.

B May I also take this opportunity to add that in the event there is no assessment of damages made by the trial court and a party's appeal is against only liability, the party should write to the magistrate or to the sessions court judge requesting him or her to assess the damages for the purpose of the appellate court's consideration. Upon receiving this award on damages which is supplied on request, the party concerned could then, C if he or she does not wish to appeal against the award of damages, file a supplementary record of appeal if the award of damages is not supplied within the time permitted by the rules of the court to file the record of appeal ;or, if necessary, to apply for leave to extend time to file the award of damages by way of a supplementary record of appeal or if the need arises, to apply for leave to appeal out of time against the award of damages by the D trial court depending on the circumstances of the case.

*Order accordingly.*

Reported by Andrew Christopher Simon

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